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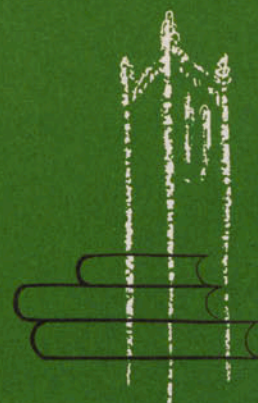
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The Law School Record



Volume 3

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Number 2

On the Art of Argument

Professor Karl N. Llewellyn introduced Chief Justice Walter V. Schaefer '28 and Mr. James A. Dooley at their discussion "On the Art of Argument" before The Law School students and faculty. Mr. Llewellyn reminded the audience that the conscious study of the art of argument once had high development among the Greeks and again in medieval times. He welcomed our speakers as reintroducing into American thinking a study which had been too long neglected.

THE APPELLATE COURT

CHIEF JUSTICE WALTER V. SCHAEFER

Illinois Supreme Court

I am largely but not entirely at a loss. I am not a prophet. I am not a great scholar. I am not a great teacher. My role here was described and anticipated some years ago by a very great lawyer, John W. Davis. He was giving an address on appellate advocacy, and he peppered his remarks with something like this: "I must apologize for being here before you to speak upon the subject, for who would listen to the weary discourse of the fisherman on the relative attractiveness of various types of flies, if the fish could be induced to talk." Taking my role from this story, I am the fish, and I am to indicate the relative effectiveness of various types of lures. As I understand it, I am to talk upon the subject of appellate presentation, including both the brief and the oral argument.

So far as the literature on the subject of briefs is concerned, I would refer you to two articles by two Illinois lawyers, Paul Ware and Owen Rall, and they are as good as anything I have seen anywhere on the subject. The articles are in the spring, 1952, issue of the *Illinois Law Forum*. These articles will refer you to the rest of the literature, including the essays by Wiener, Jackson, Davis, Wilkins, Carr, and all the rest. Actually, you can cover the literature in the field in a fairly satisfactory fashion in two hours. It is a rather fascinating little select body of literature. I do not think the literature generally is perhaps too profound, but it is interesting, and it is fun reading.

Now, just a word as to the brief, and this word is equally applicable to oral arguments. Keep in mind your purpose and keep in mind the person or persons to whom your argument is addressed. I think this is of the

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THE TRIAL COURT

JAMES A. DOOLEY

President, Association of Plaintiffs' Lawyers

This meeting to me represents the realization of a proposition for which I have always stood; namely, that the law schools should teach the law students something about litigation. No lawyer can be a lawyer in the true sense of the term unless he knows the problem of litigation. And I mean the problem of litigation in the trial court, the problem of litigation in the appellate court, and in Chief Justice Schaefer's court. How can a lawyer even advise a client unless that lawyer appreciates the problems which go with litigation? If you are to be lawyers in the true sense of the word, learn as much as possible about this problem.

A medical student does not go into the world and perform an operation on someone merely from the knowledge he obtained on surgery out of the textbooks. He has worked in the laboratory; he has assisted and has participated in operations. That is where he gets his working knowledge. And there is a laboratory for all of us students of the law, and we must remain students as long as we practice—that laboratory is the courtroom. And I think it characteristic of the progressive nature of the University of Chicago in seeking to bring the laboratory of the law to the law school. It is much like meeting the mountain, since the mountain cannot be brought here.

Now, of course, we are back in the trial court. The case has been reversed and remanded for trial by the Chief Justice.

The most important phase in the trial of any case is the preparation phase, and that facet is accomplished without the confines of the courtroom. Ninety per cent of all cases tried, in my opinion, are won or lost outside the court-

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FACULTY PROFILE

Sheldon Tefft

Without intending to pin the dread label of conservatism on Sheldon Tefft, I see no escape from stating, right at the outset, the unpleasant fact (if I must write a "profile" of him) that he is—well, not a liberal. Hugh Cox—a fellow-Nebraskan and lawyer—has opined that his friend Sheldon is not quite so conservative as he appears to be. I have no superior knowledge. But I can imagine him voting against

all sorts of measures and candidates during the last two decades. He has been definitely of the minority.

Tefft seems to me to be a vanishing American in other respects, apart from the political. Perhaps I should hopefully indicate here, too, only a temporary obscurity, not oblivion. There used to be an ideal of "nothing too much," balance, moderation; reserve was once considered admirable in social behavior; care in speaking and caution in acting were thought to be advisable. On a higher level, justice was not supposed to be dispensed exclusively by courts but also by individual persons in their opinions and dealings. There have been times in the past when those concepts had more adherents than they seem to have now. More sensational values have risen to a higher rank in contemporary life; the manifestations are everywhere, from Hollywood east and Washington west. To this development Sheldon Tefft has been quite impervious. His values are those first mentioned.

It follows that in the teaching of his subjects, property and equity, Tefft is a most careful, patient, very critical, and truly just exhibitor, adviser, expounder, and debater. He happens also to be a physically vigorous teacher, and it is not unusual for him to have thirty or more students actively taking part in the class discussion. His methods are modern—true conservatism having no correspondence with obsolete technique—but he does not make a stunt of confusion. The most influential element in his teaching is, however, his own mind and character. I should prescribe him as a cure for exhibitionism and dilettantism. He has been effective in both diseases and not only in the field of law.

I am not sure that the students in Tefft's classes really understand and appreciate what a phenomenon he is, personally—well, anyhow, what I think he is. In appearance and manner, as well as in other respects, Sheldon Tefft is as authentic an embodiment of the early American spirit as one could hope to see in the mid-twentieth century; he is early American stock personified—the kind you read about in the history books. If you want to know

what the best Americans were like, down to the end of the last century, just observe Sheldon Tefft. All people have ancestors and backgrounds, but Tefft seems to me to suggest his far more than the average.

This is all fiction, no doubt. I shall pursue it further, however, since through fiction the truth can sometimes be seen. Tefft is more specifically an early American of the North. As a northern type, very antique, he has been in this country for a long time, since the seventeenth century. We find him first in the New England states and upstate New York. He had farms there. He owned his farms from the beginning, and always. He farmed the land, too, but of course he did much more. He founded churches and villages; he incorporated little railroads; he took part in politics; he read serious books and thought and debated and had views on social, philosophical, and religious questions; and he speculated in town lots and western lands. He fought in all the wars up to and including the Civil War, except the Mexican War, that southern imbroglio, which he could not conscientiously support. He founded the Republican party, or was certainly one of its earliest members. It was natural, therefore, when this type went out to build up "our West" across the wide Missouri—in Cass County, Nebraska, below Omaha—shortly before and after the Civil War, that he should take a prominent part in the early politics of the state. In Nebraska the counties were named after Democrats but settled by Republicans. So we find Sheldon Tefft—that is to say, a Sheldon or a Tefft—in the territorial legislature, in the state senate, at the head of the Republican state committee, and, just before Wilson swept away the *ancien régime*, in the governor's chair.

Against that background, and not unnaturally, as his father was a country lawyer, Sheldon Tefft decided to take up the law. He attended the University of Nebraska from 1918 to 1924, both as an undergraduate and as a law student. Here he won, of course, Phi Beta Kappa and the Order of the Coif. In 1924 he was chosen a Rhodes scholar. From Oxford he received three degrees—B.A. in 1926, B.C.L. in 1927, and M.A. in 1930; in addition, he won the Vinerian prize in 1927. If Tefft had carried on in the family tradition, he would be farming and practicing law and politics in Nebraska today, but Oxford turned him into a scholar and a teacher. It did not otherwise change him. A member of the committee that selected him for the scholarship remarked at the time that there was no danger of Sheldon Tefft's pretending to be an Englishman on his return home. That prediction was proved correct.

In 1929, after a short period as an assistant professor of law at the University of Nebraska, Tefft came to The Law School. In 1940 he became a professor. From 1943 to 1945 he was acting dean. There were brief escapes from Chicago to teach for a term at Stanford in 1935 and

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Construction of the new American Bar Center is proceeding rapidly. The top picture is a front view of the virtually completed west wing of the building; the bottom picture, looking east from University Avenue, shows work in progress on the east wing. Plans are being made to dedicate the Center at the annual meeting of the American Bar Association, which will be held in Chicago this August.



The Conference on Insurance

On January 15, 1954, the Law School presented a Conference on Insurance, the thirteenth in its regular Conference Series. The opening session was concerned with problems of the insurance contract. Professor Brainerd Currie of the Faculty presided; the speakers were Professor Friedrich Kessler of the Yale Law School, who discussed "Forces Shaping the Insurance Contract"; Mr. James B. Donovan, of Watters and Donovan, New York City, whose subject was "The Hardy Perennials of Insurance Contract Litigation"; and Mr. Herbert Brook, of Lord, Bissell and Kadyk, who spoke on "Recent Insurance Contract Developments and Their Implication for Future Litigation."

Professor Wilber Katz introduced the luncheon session, which was concerned with insurance and investment. Mr. M. Albert Linton, chairman of the Board of the Provident Mutual Life Insurance Company of Philadelphia, discussed "Life Insurance as an Investment." The subject of "The Insurance Company as an Investor—Impact on the Capital Market" was presented by Mr. Churchill Rodgers, general counsel of the Metropolitan Life Insurance Company; he was followed by Mr. J. Edward Day, associate general solicitor of the Prudential Insurance Company, who spoke on "The Insurance Company as an Investor—Government Regulation of Investments."

In the afternoon meeting, Professor Ward Bowman of the Faculty introduced a paper on "Government Regulation of Insurance Marketing Practices," presented by Mr.

Robert B. Ely, III, general counsel of the Insurance Company of North America, after which Mr. Barry Oakes, associate counsel, Bankers Life Company, Des Moines, spoke on "Principal, Agent, and the Public."

Professor Allison Dunham presided over the evening session, which featured a discussion of "The Insurance Principle—Compulsory Insurance" by Professor Clarence Morris of the University of Pennsylvania Law School and an address on the subject of "The Insurance Principle—Government Old-Age and Survivors Insurance" by Mr. John R. Stark, Executive Office of the President (Bureau of the Budget), Washington.



Friedrich Kessler, now Professor in the Yale Law School, and at one time a member of the University of Chicago Law School Faculty, took advantage of the opportunity to talk with his former students during his visit to the campus for the Conference on Insurance.



The Luncheon Session of the Conference on Insurance brought together the group shown above at the speaker's table.

Book Reviews

THE UNEASY CASE FOR PROGRESSIVE TAXATION. By Walter J. Blum and Harry Kalven, Jr. Chicago: The University of Chicago Press. 1953. Pp. viii, 104. \$2.50.

[Reprinted, with permission, from *Harvard Law Review*, Vol. 67, No. 4, pp. 725-31, February, 1954.]

"A word fitly spoken," it was said in Old Testament days, "is like apples of gold in pictures of silver." This book, unlike much tax literature, has many sentences full of words most fitly spoken at this critical period of American tax history. It is a stimulating and highly informative book. For years the printing presses have been busy putting together books designed to acquaint readers interested in taxes with the super-technical secrets of tax law as they are incorporated in the Internal Revenue Code, the administrative process, and the diverse opinions of many courts. In contrast, this book deals with basic theory at a tender point. Justice Holmes once said: "We have too little theory in the law rather than too much. . . ." This remark, made in another context, is certainly not inapplicable to tax law—and, one can appropriately add, tax policy.

There is a surprising lack of unanimity among the experts as to the degree of progression in the American system of taxation. Of course, accurate appraisal must include the impact of state and local taxes. Rufus S. Tucker, writing in 1951, has asserted that as a whole the system is "highly progressive in the matter of rates from \$1,000 up," this being especially true, in his opinion, of federal taxation by itself. But Musgrave, Carroll, Cook, and Frane, also writing in 1951, have asserted a conflicting view that "[t]he over-all tax structure is by no means as progressive as is generally surmised, at least not as far as the lower 90 per cent of the taxpayers are concerned." Rather, they contend, "the effective rate curve follows a U-shaped pattern with regression at the lower end, a proportional range over the middle and progression at the upper end of the scale." Over a wide range of incomes, including 90 or more per cent of the spending units, the progressive elements of the tax structure appear to these economists "to be balanced or outweighed by others which are proportional or regressive." In terms of revenue it may be roughly estimated that something less than one-quarter of total receipts from the personal income tax is attributable to the graduated surtaxes.

In point of fact no one knows with any complete certainty how progressive the American tax system is. Contributing to this uncertainty is much doubt about the incidence of corporate taxes. For the fiscal year 1953 the corporation income tax contributed about 31 per cent of the gross yield of the federal tax system. Are corporate taxes borne by stockholders? To the extent that they are, they have a generally progressive effect because stock ownership is predominantly in the upper income brackets.

Or are corporate taxes shifted to consumers and wage earners? If that is what happens below the surface of statutory language of imposition, corporate taxes are regressive in their effect. Also contributing to a general ignorance about the degree of progressivity in the American tax system is lack of knowledge about the effect on an apparently progressive rate structure of a number of special exemptions and deductions such as the exemption of interest on state and municipal bonds and the percentage depletion provision.

In this vague condition of tax affairs it is almost a relief to turn attention to some things we do know very well. We do know that many of our most articulate citizens assert most emphatically that we have too much progression, presumably toward the top of the surtax brackets. One would expect that this feeling of resentment would have had more intensity before the income tax "changed its morning coat for overalls." There was a time when the income tax was a more exclusive club than it is now, say in 1920 when a population of 106,000,000 produced only about 5,500,000 income tax returns, or in 1939 when a population of close to 100,000,000 over 14 years of age produced only about 4,000,000 taxpayers. In those years the income tax directed its thrust more exclusively at the most financially successful of our citizens. Now it strikes at a much larger proportion of the population. Apparently misery does not always derive as much comfort from company as is sometimes supposed. Perhaps part of the reason is in this instance that there has been since 1939 a considerable shift of our emphasis in taxation in the direction of income and profits taxation. In 1939 income and profits taxes produced only about 45 per cent of government receipts. By 1952 they produced almost 80 per cent. It does not seem to be adequate compensation that new low-income taxpayers have contributed in large part to this trend. High-income taxpayers have also had to contribute, and we have now reached the point where everything possible is being taken from the high incomes of those who are not fortunate enough to be able to take advantage of the capital gain rate, the percentage depletion provision, and a number of further gadgets which minimize the impact of the high marginal rates.

Much of the protest against progression has identified progressive taxation as an aspect of class warfare. Some advocates of progression have not objected to this label. A recent article in the American Bar Association Journal entitled "The History of a Prophecy: Class War and the Income Tax" seems to set the modern record for emotional intensity. Mr. Samuel B. Pettengill, the author of the article, views the Sixteenth Amendment as "a political curiosity," and according to this former Congressman a number of Republicans headed by former President William Howard Taft carried a Democratic plank to legislative success when they submitted the amendment for ratification. Perhaps something worse than

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Alumni Notes

JUDGE ELMER J. SCHNACKENBERG, JD'12, for some years Chief Justice of the Circuit Court of Cook County, has been appointed to the United States Court of Appeals, Seventh Circuit, and was formally installed as a member of that court in late February. He joins an illustrious group of classmates, the Class of 1912 having already contributed to the United States Courts of Appeal the Honorable Florence Allen, of the Third Circuit, the Honorable Jerome N. Frank, of the Second Circuit, and the Honorable Walter L. Pope of the Ninth Circuit. Also



Glen Lloyd

a member of this distinguished class is the Honorable Ingram Stainback, Territorial Governor of Hawaii.

GLEN A. LLOYD, JD'23, has been appointed Deputy to Mr. Harold E. Stassen, Director of the Foreign Operations Administration. Mr. Lloyd is a partner in the firm of Bell, Boyd, Marshall and Lloyd, and is President of the Law School Alumni Association and a Trustee of the University of Chicago.

ARNOLD R. BAAR, JD'14, for many years a partner in the Chicago firm of Kixmiller, Baar and Morris, has been appointed a Judge of the Tax Court of the United States, and began serving with that Court in April.

ROBERT TIEKEN, Class of 1932, has been appointed by President Eisenhower to be United States District Attorney for the Northern District of Illinois. Mr. Tieken has for several years been a member of the Chicago firm of Winston, Strawn, Black and Towner.

IRWIN N. COHEN, Class of '30, served this winter as temporary United States Attorney for the Northern District of Illinois. Mr. Cohen, an Assistant United States Attorney since 1949, was elected by the eight judges of the United States District Court.

CHARLES B. BAKER, JD'38, has been appointed president of Universal Atlas Cement Company, a subsidiary of the United States Steel Corporation, with which he has been associated in a variety of capacities since his graduation from the Law School.

Scholarship News

The academic year 1954-55 will be the second of three years in which a student of the School will receive a scholarship of the value of \$1,000 as a gift of the Ekco Foundation. This Foundation was established by the Ekco Corporation, of which Mr. Benjamin A. Ragir, Class of 1936, is president.

The Leo F. Wormser Scholarship was established in 1935 by friends of Mr. Wormser, JD'09. In 1940 a gift to his fund was made by Mrs. Leo F. Wormser in memory of Mr. Wormser's mother; from time to time further funds have been contributed by friends of the family. This winter, substantial additional contributions have been received. These added resources will renew the strength of the Wormser Fund, which has already benefited many able students, among whom were Tucker Dean, now professor of law at New York University; Monrad Paulsen, professor of law at the University of Minnesota; Kent Luckingbeal, of Root, Ballantine, Bushby and Palmer, New York City; Dale Stucky, of Fleeson, Gooing, Coulson and Kitch, Wichita, Kansas; and Dudley Zinke, of Pillsbury, Madison and Sutro, San Francisco.



Arnold Shure

Mr. Arnold I. Shure, Class of 1929, has presented to the School a full-tuition scholarship for the academic year 1954-55. Mr. Shure has for many years been active in the affairs of the School's alumni and was prominent among the members of Phi Sigma Delta Fraternity who last year donated a full-tuition scholarship. Mr. Shure's gift will make possible the continuance of the education of an unusually promising student.

THE SUMMER QUARTER—PROGRAM OF COURSES

JUNE 21 TO AUGUST 28

CIVIL PROCEDURE. PHILIP B. KURLAND, *Associate Professor of Law, The University of Chicago Law School*

TORTS. JO DESHA LUCAS, *Assistant Professor of Law, The University of Chicago Law School*

FAMILY LAW. RALPH F. FUCHS, *Visiting Professor, The University of Chicago Law School; Professor of Law, Indiana University School of Law*

TRUSTS. GEORGE E. PALMER, *Visiting Professor, The University of Chicago Law School; Professor of Law, University of Michigan Law School*

DECEDENTS' ESTATES. CORWIN W. JOHNSON, *Visiting Professor, The University of Chicago Law School; Associate Professor of Law, University of Texas School of Law*

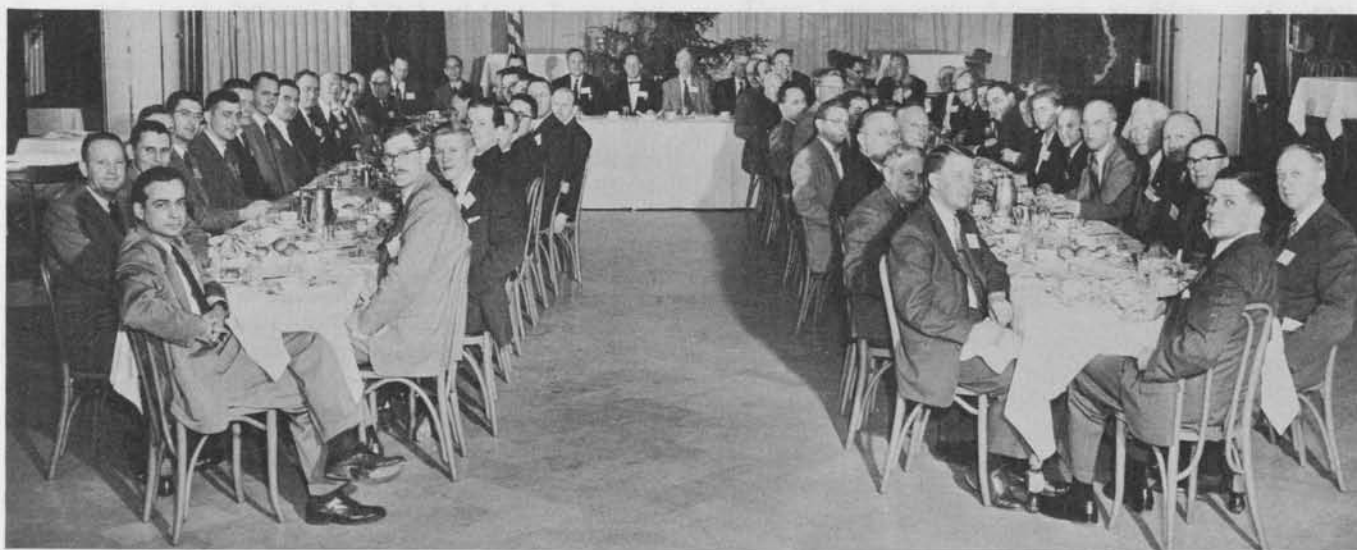
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MILITARY LAW. WILLIAM R. MING, JR., *Lecturer in Law, The University of Chicago Law School*

SEMINAR ON CORPORATE SECURITIES. CHARLES A. BANE, *Lecturer in Law, The University of Chicago Law School*

In addition to the above, a seminar will be offered by THE HONORABLE WALTER V. SCHAEFER, Chief Justice of the Supreme Court of Illinois.

Entering students may register for the courses in Civil Procedure and in Torts.



Present and former members of the Faculty, and alumni now teaching law, met at a luncheon during the annual meeting of the Association of American Law Schools.



The guests hear a report on the Arbitration Project from Professor Soia Mentschikoff



Victor H. Kulp, JD'08, now Professor Emeritus at the University of Oklahoma Law School, and Victor Stone, Research Associate on the Jury Project, at the reception preceding the Association of American Law Schools luncheon.

Krock on Crosskey

In February, Mr. Arthur Krock, of the New York Times, devoted two lengthy columns to comment on Politics and the Constitution in the History of the United States, the recently published work of Professor William W. Crosskey of the Law School Faculty. By permission of the Times, Mr. Krock's comments are reprinted below.

WASHINGTON, Feb. 15—Signs are appearing that, after the current movement to amend the Constitution has been disposed of, lawyers, judges, historians and professors of English will become even more fundamentally involved over a new interpretation of the National Charter than Senators and lawyers are now over an old one. This revolutionary opinion of what the Founding Fathers really intended the Constitution to mean was expressed in a recent book by Prof. William Winslow Crosskey of the Law School of the University of Chicago.

If the thesis of this book were before Congress instead of the Bricker amendment and its flock of substitutes, the current Senate debate would be riotous instead of merely confusing. That is why one critic has already described the book as "dynamite," and why the law reviews are devoting great space to it. Imagination falters before the thought of what this book, if adopted as political doctrine by either major party, would do to the blood pressures of Republicans and Democrats who already find loopholes in the Constitution through which abuses of what they consider strictly reserved Congressional and state powers may enter our governing system.

Nevertheless, Crosskey's conclusions from the amazing research he did are finding influential support. And there is evidence that among his earnest students are members of the Supreme Court. Yet at some point one of his conclusions rejects some firm belief held by experts who will go along with others.

The New Deal lawyers who argued that the Constitution's clause giving Congress authority over "commerce" should be interpreted with new breadth, and the judges who sustained them, will be pleased with the result of his research on that subject. But they will not be pleased with his conclusion that the Supreme Court has been violating the Constitution in declaring that Acts of Congress, except those in a limited group, are in consonant with the National Charter. And so on.

WHAT WORDS MEANT IN 1789

The book began in 1937 with work on a proposed law review article on the commerce clause. But this led to a search of fifteen years through archives mostly undisturbed theretofore—forgotten files in large and small libraries, private papers, the whole context of the writing of the Constitution. Crosskey put special labor on the vocabulary of the eighteenth century, in which it was

composed. And he decided, according to the editors of the University of Chicago Law Review, that:

The Constitution, far from being the glorious but vague, and general statement of the purposes, powers, and, above all, the limitations of our Federal Government, was in reality a tight, meticulously drafted, wonderfully consistent document. . . . As originally understood [in the eighteenth century vocabulary] it provided a charter for a government admirably suited to modern conditions.

Among his conclusions were:

¶"Commerce," as employed, meant "all gainful activity" by the people; hence the long-made distinction between "interstate" and "intrastate" commerce is without constitutional sanction.

¶To interpret "states," as the Supreme Court does, to mean "the territory" encompassed by each of them is contrary to the eighteenth century meaning, which was "the people" within those borders. Thus in those days they wrote "The State of New York are able to supply themselves," etc. This locution proves that the Founding Fathers intended Congress to have the power to regulate all gainful activity of the people everywhere.

PREAMBLE THE MASTER KEY

¶Their intent also, when they gave Congress authority to pass all laws necessary and proper for general welfare and the common defense, was for Congress to be supreme among the different branches of the Government. Legislative supremacy was the concept of the eighteenth century. The language of the Preamble, which was carefully constructed in the locution of the time, proves this by its statement of the Government's obligations, the attainment of all of which was assigned to Congress.

¶The English common law as applied to American conditions, and Parliament's unreviewable power to make statutes, formed the concept of the American colonies in 1787-89. The Supreme Court was never intended to possess a general power to review Acts of Congress but only to protect its own enumerated powers as expressed in eighteenth-century language.

¶Conversely, the Supreme Court is not, as it has long held, bound by the Constitution to follow the interpretations by state courts of state law and common law: in accepting that limitation it has "abdicated" its granted authority as the supreme tribunal.

¶Except for the First Amendment, and the appeals clause of the Seventh Amendment, the Bill of Rights was designed to apply to the states as well as to the nation, and the steady stream of laws and decisions to the contrary is made up of violations.

Historical research before has had its effects on the Supreme Court, for instance Charles Warren's "New Light on the Judiciary Act." The Crosskey book may provide another example, but only after a forensic battle of atomic intensity.

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Law School Notes

Frederick H. Lawson, Professor of Comparative Law, Oxford University, delivered a public lecture on "A Comparative View of Administrative Law" under the auspices of the Law School. Earlier in his visit, Professor Lawson discussed English legal education at a luncheon meeting of the School's alumni.

John P. Stevens has been appointed a Lecturer in the Law School and is currently teaching the course in Competition and Monopoly. Mr. Stevens has been Counsel for the Minority of the Celler Committee and has been associated with the Chicago firm of Johnston, Thompson, Raymond and Mayer. He is a member of the Federal Committee on Antitrust Law, and is currently a partner in the Chicago law firm of Rothschild, Stevens and Barry.

The Honorable Hugo L. Black, Associate Justice of the Supreme Court of the United States, and Zechariah Chafee, Jr., University Professor, Harvard Law School, were among the group of eight eminent members of the profession who were to be awarded honorary degrees at the Special Convocation in Celebration of the Fiftieth Anniversary of the Law School last May.

Professor Chafee was abroad at that time, so the conferring of his degree took place at the Autumn Convocation last December. Following the Convocation, Professor and Mrs. Chafee met the Faculty and students of the School at a reception at the Quadrangle Club.

Illness prevented Mr. Justice Black from attending the Fiftieth Anniversary Celebration last year. He received his degree at the Winter Convocation in March. The Justice was the honored guest at a reception which followed the Convocation and which was attended by the Faculty, alumni, and students of the School. Subsequent to the reception, the residents of the Law School Dormitory and the members of the staff of the *Law Review* sponsored a dinner for the Justice in the Residence Halls.

A luncheon meeting of Law School alumni now engaged in the teaching of law, and of current and former members of the Law School Faculty, was held at the Edgewater Beach Hotel on the occasion of the annual meeting of the Association of American Law Schools. The guests heard reports from Professor Soia Mentschikoff and Professor Philip B. Kurland on the progress of the Arbitration Project and the Jury Project, two of the research activities which the School is conducting under a grant from the Ford Foundation.

Max Rheinstein, Max Pam Professor of Comparative Law, met with a group of Law School alumni in New York to discuss the current activities of the School's Comparative Law Research Center, of which Professor Rheinstein is Director. Mr. Rheinstein has recently been elected to honorary membership in the Gesellschaft für Rechtsvergleichung, the Society of Comparative Law of Germany.

Dean Levi recently delivered an address on the anti-trust laws before the Lawyers Association of Kansas City, of which Roy K. Dietrich is president. Prior to the speech, Dean Marlin M. Volz of the University of Kansas City Law School held a reception in Mr. Levi's honor. Walter A. Raymond, '22, and Raymond B. Lucas, '15, were among the alumni there to greet Mr. Levi.



John P. Stevens



Max Rheinstein



The reception honoring Mr. Justice Black seems to have been well attended



The students of the School honor the Justice with a dinner, following the University Convocation.



Mr. Justice Hugo L. Black enjoying an informal conversation with a group of students following his receipt of an honorary degree.



Frederick H. Lawson, Professor of Comparative Law, Oxford University, delivering a public lecture in Law South.



William King, Professor Zechariah Chafee, Jr., of Harvard Law School, and Professor Malcolm Sharp, at the reception honoring Professor Chafee. The reception followed a University Convocation at which Professor Chafee was awarded an honorary degree.

The Appellate Court (Continued from page 1)

utmost importance. We find some briefs in our courts by lawyers who, presumably, are well compensated for the job that start off something like this: "The trial court erred in refusing to give full effect to the previous decree of the court of Macontoby. It is well established that a decree rendered by a court having jurisdiction over the person in the subject matter is entitled to. . . ." And then cases are cited. Our Court does not have from this the faintest notion of what the case is about. I have literally read as much as ten pages of a brief without being told what the case was about. In fact, our Court has read entire briefs and in at least one instance heard an oral argument without being told what the lawyer's point was—and this after some effort to abstract a clarifying statement by questions from the bench. So keep in mind that your main objective is clarity. You are trying to get the court to understand.

There are some subsidiary aspects to the problem of clarity—of getting the court to understand. The court is approaching the matter from an entirely objective point of view. In real life, as a lawyer before the appellate court, you will be approaching the argument with the heat of the trial court still about you. The tendency to carry over some of that heat will be hard to avoid. But you should avoid it scrupulously. The heat of the trial battle will not help the reviewing court at all. It will not help your case.

Both in the oral argument and in the written brief be wary of how you use the court's own language. A man does not sit very long on an appellate court before he becomes extremely cautious as to the meaning of what some judge, including himself, has said in some earlier case. Your naïveté about that when you are a judge lasts just until the first time somebody quotes back at you something you have written yourself. After that experience, your guard is eternally up. Having seen how what you wrote with a particular situation in mind and confined to that really—and perhaps you were a little careless, even though you tried not to be—can be quoted as applicable in quite different circumstances, you are going to be cautious about taking the words at their sheer face value, whether it be your language or some other judge's. Moreover, opinions do not all have the same value. Even your own opinions are not all of equal persuasiveness to you; they are not all of equal effect. That is because of what your job is and because of the characteristic of the business. The universal characteristic that every case shares in common with every other case is that it has to be decided, and in a reviewing court typically it has to be decided by written opinion. You convince yourself as Cardozo once said, 51 per cent, and then you write an opinion that indicates you are convinced 99 per cent. Your colleagues may go along with the opinion convinced in varying degrees from somewhere in the 40 per cent area up to somewhere in the 70 per cent range. The

opinion that emerges is the opinion of the court, but it is actually a very close decision, not to be stretched, not to be expanded, and not to be distorted.

If you are asking the court to overrule a case, you should do so frankly. If your brief fails to mention a case which governs or has governed the kind of situation involved, the judge may read your brief with an uneasy feeling that something has been left out. The judge is likely to say to himself, "Now something has been said on this question; I'm not absolutely sure what it is, but where is it set forth in here?" and he will keep mentally looking for the case. Then, when the controlling case is set forth in your opponent's reply brief, your failure to have dealt with it is, of course, emphasized. Do not run that risk. Be entirely frank. If you are running into a case that is against you, or if there is an aspect of the facts that is against you, bring it out yourself. Do not leave it to the other man to bring it out and to exploit your discomfort.

Now as to the oral argument, I suppose the first question in our Court is whether or not you should ask for oral argument at all. That is a question in a good many other appellate courts where oral argument is not required or indicated by the court itself in specific cases. I think oral argument is extremely valuable. Someone has described it in this way: "It's the one opportunity the lawyer has to make sure that the essentials of his argument have passed at least once through the minds of the judges who decide the case." I think oral argument is actually entitled to a much stronger footing than that. In my judgment you ought to argue any case that is worth asking the court to decide. We do not have that many oral arguments now, but I suppose that in the next five or ten years that may come to be so.

So far as the technique of oral argument is concerned, and these are largely generalizations, you should keep in mind your objective. You are talking to a group of men by way of exposition and persuasion. They will know your case in varying degrees. In our Court it may be that about half of them will have read the briefs. You always ought to try to find out, before you make your argument, what the practice of the reviewing court is with respect to reading the briefs in advance of argument. The answer to this will make a difference in the way in which you present your case. In our Court you cannot be sure. In some cases all of the judges will have read the briefs; in a very rare case, where we are in a terrific jam, it may be that no judge has read them. That would be a rare situation with us today, although it once was the rule. You ought to keep in mind that, to at least some of the judges, your problem is likely not to be at all familiar. You should state your facts, without heat, and then go into your argument.

When you go into your argument, argue without reading. Our rule prohibits reading from the briefs. No court likes reading from the briefs. There is a story told about the Supreme Judicial Court of Massachusetts, in which a

man was standing there reading insistently and persistently from his brief, and one judge—so the story goes—wrote a note and passed it to his colleague. The note said, "A brief-reader is the lowest form of animal." The colleague looked at the note for a moment, took his pen, wrote something on the paper, and passed it back, and it read, "He is a vegetable." In our courts there is a curious practice indulged in—prompted, I suppose, by the rules prohibiting reading from the briefs. The curious practice is that the lawyer writes out his oral argument and then reads it to the court. The only appreciable difference between reading the argument or reading the brief that I can see is that, if a man is reading from his brief, the judge, by looking at his own copy, can gauge the lawyer's progress and can form some rather accurate notion as to when the lawyer is going to finish. Both methods are effective in drawing a curtain between the listener and the speaker. Do not read. It is all right to have some notes to tie yourself to, but you should know your case well enough so that you do not need to read.

Do not try to make the oral argument carry more than it can. In the average argument it does you no good, for example, to cite a case by the full citation, including the page reference and copious quotations. Of course, you want to place the case cited in point of time, and you can do that usually by naming a volume or the approximate year of the decision. Of course, there are unusual situations where you will want to do more than that. But all the oral argument can do is to leave an impression. You cannot expect a court to keep in mind precise facts—the very dramatic facts, yes; the details, no. Yet the impact of oral argument is very strong. We hear oral arguments in a term, and normally we have perhaps as many as forty or fifty in a term. The surprising thing is that, when the judge comes to work on the case, it slips into focus. It is incredible how this happens. I have a poor memory, and it should not work with me, but it does. I have checked with my colleagues, and it works with them. The judge will pick up the case; the title will be unfamiliar; the name of the lawyer may not mean a thing, and then all of a sudden there is some fact that is familiar, and the whole oral argument comes back into focus. I can pretty well see the man argue, and I can pretty well remember what he said, even if I have been so interested in the argument that I have failed to take notes.

Brevity is most important. The tendency of many a lawyer is to think that, because he has half an hour within which to argue his case, he has to take the full time. This does not follow at all. Some of the most effective arguments are made in fifteen or twelve minutes, and, when the argument is over, there is nothing more that needs to be said. When you are representing the appellee, the temptation to take up time by restating the facts will be terribly strong. I think that this is one of the most fatal mistakes that you can make. When the lawyer for the appellant has finished his argument, the

points he has made and the echoes of his argument are still in the courtroom. Now the attorney for the appellee rises to respond, and that is one of the most dramatic moments I think in our whole judicial procedure. The appellant has controlled the show up to that point; now the court is looking to that man who rises to answer, and what does he do? Ever and ever so often he starts over again and restates the facts. You listen for the first minute or so quite attentively; you are waiting for that difference—that significant difference—in his portrayal of the facts to see what is going to affect the outcome of the case. It does not come in the first minute; it does not come in the second; and it does not come in the third. You can just look out of the corner of your eye up and down the bench, and you know he has lost the court. Whether he ever makes up for this lost opportunity is anybody's gamble, but he has not taken advantage of a decisive moment. Do not be afraid to leave the case on your opponent's statements, unless it is critically damaging. Then, you will hold the court's interest when you point out the different bearing of the facts or emphasize the omitted facts. An interesting technique sometimes used by the appellee is to begin by referring not to the facts but to the general background in its legal framework of the case at hand. When successfully done for a brief period, this can take the court away from the details and give a general background. The lawyer cannot do this forever, of course, because we sit there waiting for him to come back to the case. He has got to come down to earth. But this gives him an opportunity to come back with precision on the facts he wants to emphasize, and he has dissipated the atmosphere that existed at the time he began to speak and perhaps substituted some general premises to which the court reacts favorably.

I think the best thing that has ever been said with respect to questions asked by the court is "Rejoice when the court asks you questions," and I think you should. On a minimal basis, as it has been said, at least it is fairly clear proof that the particular judge is not asleep. Starting from that minimal basis, it seems to me that there is nothing harder than arguing a case to a mute court, to a court that sits there silent, and you do not know how close to the mark your shots are going. You have no notion as to whether you are meeting the problem that is in the court's mind. You have no notion even whether or not the court has a mind. Indeed, the court may be reading the briefs of the next case. You know the court bench is never as open to scrutiny from the other side as are the law-school benches. The court bench slants upward, and that gives the court an advantage which it has always considered itself fully entitled to have.

I think most courts today will permit the use of expository devices by way of charts, maps, and that sort of thing, which can be extremely helpful. This technique can be helpful even on such matters as the construction of a statute, where there may be a full column taken up by the statute but where only about twenty-five words

are important. Putting those twenty-five words on a chart will keep them before the court. But, if you are going to use charts, make them big enough. Among the other deficiencies of judges, they tend to be near-sighted. Most of us do not confess to a weakness like that publicly, but, if you watch us lean forward squinting in an effort to follow where counsel says we should look in the brief, you will know it is true. Another point, I believe, relates to the danger of referring to a photostat in your brief rather than reproducing a big chart. When the reference is to the photostat in the brief, I have never seen it fail but that, when the lawyer thinks he is through with the diagram or map and wants to go ahead with his arguments, he will find that the court will keep right on looking at the page of the abstract. The court will keep looking at it for the balance of the argument. On the other hand, if you have the chart yourself, when you walk away from it, you can carry the court's eyes with you.

There is one basic point I would impress upon you. Keep in mind that the court is objective and that it is approaching the case as a new matter. Keep in mind also that, in deciding the case, the court, if it is worth its salt, is going to be interested in fitting this case into the existing body of decisions within the state. Therefore, in your argument, put your case at the outset into the existing structure of decisions of your particular jurisdiction. Put it into that existing structure and show the pressures of precedent which would push the decision one way and indicate also any counter pressures of precedent which might lead to an opposite conclusion. Do not argue your case, as is too often done, in terms of rules. The law actually does not live in the statement of the rule, including past statements of the rule by the court, any more than it lives in the black letter of the hornbook. The law lives and cases are decided—and advocates become great advocates because they know this—in that area of policy and in the considerations out of which the black-letter rules evolve. Keep your written argument and your oral argument pitched to take account of these considerations—not ostentatiously, I am sure I do not have to tell you that—but do not put your argument solely in terms of a bare absolute rule which the court may have announced in a particular case. You see, the judge may have written the opinion in that particular case, and he will not be impressed a bit when you tell him that the law of Illinois is inflexible because of his opinion. The judge will want to know why the rule has evolved and why it is important that the rule either be extended or cut short of your particular case. He will want to know the policy factors that govern the particular case. Your statement of these factors in the light of the structure of decided cases will be most helpful to the court, and happily you will be most helpful to yourself and to your clients if you pitch your argument this way, because this is the level on which cases are actually won.

The Trial Court (Continued from page 1)

room. All cases are factual situations, and unless we the lawyers have a comprehension of the facts and an understanding of what the facts represent, we cannot truly represent the cause. How do you get the facts? The most fruitful way, in my opinion, at the cost of reiteration, is through interviews with and signed statements from any person who might be a witness whether that person is favorable or adverse to your cause, or whether he or she professes to know nothing about it. Obtain a statement of what they know, or a statement to the effect that they do not know anything of the matter in question. The negative statement will save you the embarrassment of being confronted in court with a person full of knowledge concerning factual matters when you were led to believe that in an out-of-court interview that person had no knowledge whatsoever concerning that about which he or she testifies. A signed statement is the circumscription of a witness' ability to testify in court. It is an insurance policy that a given witness cannot violate the contents of the statement without running the risk of being plagued by it.

Of course, you students are familiar with discovery devices. I am not going to spend any time discussing this. Never, however, lose sight of the proposition that the facts in any case are the most important part of that case. Indeed, I am sure the Chief Justice will agree with me on that statement.

After you have completed your factual survey, it is usually well to confer with your client. Your investigation might have revealed things which apparently contradict what he has previously told you. In an interview with him, you can ask him about these apparently contradictory matters. Frequently, he will have a valid explanation, yet, if you were to go to court with that explanation, you would be in no position to explain the apparent contradiction for others. "Facts do not always interpret themselves," and a trial is a classical interpretation of facts.

Your preparation should also concern your own knowledge. In almost every lawsuit there is some scientific or commercial matter involved. Thus, if it is an accounting situation, or a medical case, or litigation involving dynamite, do some work on it. Go to the textbooks and the appropriate journals. Then when in conference with an expert, upon whose knowledge you wish to draw, tell him your understanding of the problem and ask him if it is correct. With that fundamental knowledge which you have already obtained by your own work, you will find that your concept of the problem is readily made clearer. This is very important. Shall we call it "self-preparation on the meaning of the facts in a given case"?

Know, too, the law of the case. Know what you have to prove in order to make out the case. If you represent the defendant, know what the plaintiff has to prove in

order to establish an issue of fact against your client. Unless you know the law of the case, you will be uneasy throughout the trial. You will find yourself at sea because of ignorance of those matters which must be not only stressed but illustrated. Without knowledge of the law of the case, you do not know what is necessary evidence. Perhaps the proof is within the words of the witnesses you have called. Yet, you may not inquire. The result? Your case may fail for want of proof.

In the law school they probably tell you much about the law. All I can say is always remember the law as applied to the facts is the essence of each lawsuit.

That which at all times dominates the conduct of the advocate is best summed up in this query: What will its effect be upon the jury? This thought is paramount in the advocate's mind when he decides whether he shall accept a given case and follows him albeit subconsciously throughout the trial.

A lawsuit is a problem with a human instead of a mathematical equation. That human equation is, of course, the jury. Unless we give due regard to this fact, we shall never reach a favorable solution.

Of course, no one can tell another how to try a lawsuit. And I do not care who he is; it just cannot be done. And why is that? Because of the subjective element. We are all different. You are you, and I am me. And what might be effective for you may not be effective for me. And if I were to attempt to imitate you, if I were to try a case as you, I would lose that sincerity and that earnestness which is so important to one who is attempting to convince twelve persons whom he has met for the first time and with whom he is discussing this judicial investigation. Be yourself. And another reason why you cannot be an imposter is found in the fact that there must be flexibility in the trial lawyer. The trial lawyer must have a change of pace. He must be able to be gentle at times and, on occasions, proceed "straight from the shoulder," as it were. He must be equal to the given situation if he is to be consistently successful.

I have said no one can tell anyone else how to try a case. However, there are a few cardinal principles which govern the conduct of anyone in court. The first, and the foremost of all those principles, is to make the case simple. I do not care how complicated any case may seem to be, you will find that it turns on one or two kingpins. And make those kingpins of your case stand out from the very outset. Do not throw in a lot of "stuff"—and I use that word advisedly—which tends to confuse the jury. Do not depend upon argument to clear the smokescreen you have created. Let the important questions stand out from the very beginning of the case. In fact, if you can do it in the interrogation of the jury, do it. The earlier the jury knows the issues in the case, the better.

With reference to simplicity, may I make this suggestion? When the matter involves something requiring

scientific knowledge, medical knowledge, or knowledge unusual in any degree, do not vaunt that knowledge. Many times I have listened to cross-examinations wherein the only two persons in the courtroom who knew what was being discussed were the expert witness and the cross-examiner. The jury knew nothing about it, and many times I myself felt much as the jury. Always keep your case at jury level.

Second, you must be a salesman, because you have something to sell, namely, the merit of your side of the case. And, of course, the greatest salesman in the case is your client. In fact, we tell all our clients that they have to be salesmen. Sometimes they look at you and say "Huh?" Tell them that the Fuller brush man does not have a monopoly on salesmanship. Tell them how they have to have those characteristics which people like. They have to be personable. They have to be polite. They must at all times hold their tempers, no matter what is brought out on cross-examination.

Third, the lawyer, especially he who has the burden of proof, must keep the case moving forward. After all, is he not the advocate who is asking the jury to affirmatively state that a given proposition has been proved? By keeping the case moving forward, I mean doing the thinking for the jury. If your client has the burden of proof, he has to score points. Remember that the court will tell the jury that if the evidence is evenly balanced, the verdict will be for him who has no burden. Remember that that will be the argument for opposing counsel. Thus, is it not evident that in order to forestall a tie—which means a loss for that side of the docket having the burden of proof—you must move forward and score on the opposition?

Fourth, the conduct of the trial attorney should be the epitome of sincerity and earnestness. Unless he has an obvious sincere belief in the merits of his case, he cannot convince others. Although "The Importance of Being Earnest" may be the title of a book, it may also be a rule to govern the trial lawyer at all times.

Fifth, never be personal with your adversary. No matter how unprofessional his tactics may be, no matter what the bar as a whole may think of him, no matter whether he may be personally distasteful to you, never indulge in personalities. He will have two or three friends on the jury, regardless of what he is. And once you begin to treat the matter as an issue between your adversary and yourself, you will be "hitting home," and they, who might otherwise decide the case for you on the facts, will be against you. Indeed, you might well prejudice yourself to the extent that they will be against your cause because of your personal conduct. And when such is the situation, you have not only failed in your duty as an advocate, but you have done your client a great disservice.

Always remember that your purpose in the case is to present proper evidence and to exclude improper evidence. If you have an objection, address yourself to the

court. Make a specific objection, state your reasons, and let the court rule on it. Stay out of these "asides" with opposing counsel.

Sixth—and this, I think, is very important—if you and the court disagree on some question of law, do not have that disagreement in the presence of the jury. After all, the judge is the judge. And to the twelve lay persons who are hearing the case, he is the most learned man of the law in the room. If you have a question of law upon which you and the judge happen to differ, take it up without the presence of the jury. At times it will be necessary to be firm with a court and to state your position, fortified with authorities. If the court, nevertheless, rules against you, make your record in the proper way. But do not get into any argument with the judge in the presence of the jury, because it will be certain to hurt your cause. Stay on the good side of the judge—at least in the presence of the jury.

Many questions have been asked about juries by a few of the students. The examination of the jury is probably as important as any single phase in the case. And why do I say this? Because that is the opportunity, and the only opportunity, that the lawyer has to converse with each of the twelve jurors. It is sometimes said the judge should select the jury, and some judges do it rather well, yet it only takes ten or fifteen minutes longer if the lawyers do it properly. If the lawyer examines the juror, he has the opportunity to converse with the person. Is there any better index to a person's makeup than conversation? A person may be well dressed, apparently intelligent, but conversation will reveal him otherwise. The conversation with the prospective juror will tell you much about his makeup, his station in life, and how he would react to a given situation. Forecasting possible reactions is why we select jurors.

Much has been said and more written on how to examine a juror. It may be summed up thus: Make a good impression on the prospective jurors. How do you do that? I do not know. But I think there are a few guideposts. In the examination be very polite with the prospective juror. Never talk down to him. Thus, if he says he is a *maintenance* man, don't say: Where do you do the *maintenance* work? Never do anything to embarrass a prospective juror in the presence of the strangers with whom this juror has to live for at least two weeks. And, if you believe or feel that you have done anything which has embarrassed a prospective juror, do not hesitate to let that juror go. Else you will be trying the case with the fear that one of those jurors is against you.

And be candid with the prospective juror. Be open with him. Bring out the unsavory in your case. If you represent someone who has a criminal record, reveal that in *voir dire* examination. Qualify the jurors on whether they can give such a person a fair trial. And then when you get their answers under oath, you can make much of that in your argument. Anything which is unfavorable

about your case can, if revealed by you, have the "sting" taken out of it.

Nor should you be too inquisitive. Get the necessary information without prying into the lives of these persons. After all, remember, as I have stated, they are there among a host of strangers and when you ask a lot of questions which go into their personal lives, and which turn the clock back for them maybe twenty or thirty years, you might well embarrass them.

There are occasions when it becomes necessary to qualify the jurors about certain aspects of the case as a whole. Take, for example, an action under the Federal Safety Appliance Act. That statute is foreign to the jury. You cannot damage yourself by obtaining a commitment from each of them that he or she will follow the law as given to the jury by the court. Again, suppose the case involves substantial damages. It might be well to seek an agreement from each of the jurors that if the defendant is guilty, he or she not only can but will return a verdict for a substantial amount, provided a substantial verdict is justified by the law and the evidence. Whenever there is anything unusual about any feature of the case, the practice of qualifying the jury as to that particular phase should be followed.

Today we have women and men jurors. And, sometimes, it is good to try to get women. Sometimes it is good to try to get men. And why is that? Consider women—as I know all of you do. My experience has led me to believe that if a woman has anything some other woman desires, such as good looks, a handsome husband, or money, beware of women. Women's inhumanity to womankind is unequaled. Women are more severe judges of their sex than the Judge of Judges. They subject the conduct of another woman to a microscopic scrutiny. Of course, if the woman has nothing that another woman wants—making her what I believe women call a good woman—and by that I mean some poor bedeviled soul, then women are all right on the jury. Women, on the other hand, are usually very good where you represent a male—especially if he is handsome. He might be the biggest roué you have known. He might be impeached on twelve occasions during the trial. But they overlook all these things in a man. They employ the "double standard" in the courtroom too. In children's cases, women are, likewise, good. Now, men are, as a whole, pretty level. And they are especially good if you represent a woman, more so if that woman might remind them of their mother.

There are certain people whom you should avoid. Into that category I place, first of all, wealthy people. They are always afraid that the status quo will be disturbed. They are always afraid that a verdict will affect their own pocketbook or increase their taxes. And, as I say, they are inclined to leave the parties where they found them.

Bank clerks, and those employed in clerical capacities by large corporations for many years, are also to be

avoided. They are, as a rule, persons of limited horizons. You cannot try your case and at the same time change their makeup. Likewise, I like to avoid engineers and efficiency experts. These persons consider a lawsuit on a mathematical basis. Now, a lawsuit is a problem. But, as we have said, its equation is not mathematical; it is human. They do not appreciate that. They are thinking with a slide rule. They are not good, you will find.

Personally, I like to avoid young people, too. They have not had enough of the experiences of life to appreciate, in so far as a personal injury case is concerned, the full meaning of the injury, or the death, whatever it may be.

What, then, is the makeup of a good juror? Well, a good juror, to my way of thinking is a person forty-five years of age or over, with some experience in the affairs of life, falling without the categories which I have just listed.

We all recognize that the only good jury is the jury which returns the verdict for the cause you represent. But, sometimes that is too late to find out; it's like an autopsy—you are dead before you learn what is wrong with you.

What about the opening statement? When should you make one? If you represent the plaintiff, you should by all means make a statement. If you represent the defendant, whether or not you make an opening statement will depend upon the circumstances of the case. In making an opening statement for the plaintiff, you should tell the jury everything you expect to prove in that statement. And do not be saying, "I hope the evidence will show" or "I think the evidence will show." Do not evince uncertainty. You need not overstate your case, but the science of semantics says that there are certain words which indicate uncertainty. Do not use any of those words, or any of those phrases. Because if you are uncertain, how can the jury be made certain? State your case. Tell the good features. Tell the weak points. State it in a chronological detailed manner so that the jury can visualize the situation. And when they hear the testimony of the witnesses and see the exhibits which are admitted into evidence, these will have some meaning for them. The purpose of the opening statement is to give the jury a preview of the case.

In the presentation of evidence try to follow the opening statement. Present the case in a chronological way. And I am glad to hear Justice Schaefer say that his court favors graphs and visual aids. Put those in evidence first. Then your first witness is the man or woman who is your best—the witness who clinches liability with serpentine force. It is the old story of first impressions being lasting ones. Sandwich in your weaker witnesses. Probably the last witness should be your second-best witness. But calling a lot of witnesses may lead you into trouble. I prefer to have the statements and give the other side the witnesses. Just put on the witnesses required to prove your case or your defense. If you have

statements from the other witnesses, then you have them tied down. If they should testify without the confines of that statement, they are impeached, and the other side's cause is damaged. Above all, if you are ever uncertain about whether a witness will make a good witness, do not put him on the stand.

Cross-examination can be dangerous. Usually it results in having the witness repeat his testimony a second time. If a witness has not damaged your case, do not cross-examine him. By so doing, you can give importance to testimony actually unimportant. Do not cross-examine without a motive. The cross-examination must be conducted so that motive is never known to the witness. Accordingly, it is well to go from one subject to another so that your motive is thus concealed. Do not attempt to make a damaging admission too perfect. If you do so, your effort will probably result in the witness recovering himself.

While the witness is testifying on direct, watch him. Many lawyers are busy writing down what he says without looking at him while he is testifying. Personally, I like to watch the witness on his direct examination. You can usually tell whether he is the type of witness who will adhere to every detail of the direct examination when being cross-examined, regardless of the actual facts. Moreover, you will be in a position to know those facts about which he is uncertain. Does he hesitate? Perhaps he shows some reluctance about a matter which you can effectively cross-examine upon. You will frequently find that observation of the witness will reveal his "Achilles heel."

Cross-examination methods? Here honey draws more flies than vinegar. This business of shouting at the witness, pointing a finger in his face, does not accomplish anything. You will find that you will get more damaging admissions from any witness if you treat that witness politely and with deference. Treat him kindly. As you go along, you will find that you will get admissions from him. If you have something with which to destroy the witness, such as an impeaching statement, I think it should be used at the outset of your examination. First of all, get him down deep in mire. Get him down on record two or three times to what he testified to on direct, and then use the impeaching statement. After you use that impeaching statement, you find that you are usually the master on the rest of the examination. He will agree to almost anything you say, because he does not know what else you have. You deflate him; you demoralize him; you make him fearful. That is why I say to use the destructive force at the beginning. Of course, you do not use a statement unless it is really impeaching. If you have a statement from him and it just has one or two contradictions in it, do not use it, because a jury will know that he told outside of court substantially what he told in court.

Argument is not argument in the true sense of the term. You are not arguing with your adversary; you

are merely seeking to persuade twelve persons who must listen to you. The jury is a captive audience. You are the one who chooses the topic. You are the one who chooses the mode of presentation. You will be surprised at what a calm, orderly discussion of even the undisputed facts will do for your side. Use all the rhetorical devices; similes, metaphors, illustrations, everything to help the jury think, because argument is nothing but an audible thinking process. Once you get the jury thinking with you, then, of course, you have gained the upper hand and are their master.

May I observe that expert testimony, notwithstanding the many volumes written about it, is frequently overlooked. Many times we encounter situations with facts which have meaning only when explained by an expert. This is an effective avenue of illustrating the meaning of facts when such are not within the purview of the ordinary man. Always investigate the feature of expert testimony in your case.

May I direct your attention to the hypothetical question—properly employed this is an effective device. Indeed, it constitutes an argument while evidence is being introduced. It wraps up the entire case, so to speak, and presents for the expert an opinion which makes for better understanding by the jury.

Another word. Rebuttal evidence is, it seems to me, overlooked. Too often a witness for the defense testifies concerning a fact which has not been brought out on the plaintiff's case. The plaintiff disputes that fact and has within his power evidence to controvert it. However, he accepts that the jury understands that he denies these facts and closes his proof when the defendant does. The realization of this error is not appreciated until he hears defendant's counsel argue that thus and so was not denied by the plaintiff. The same holds for the defendant as well as the plaintiff. As far as the defendant is concerned, it becomes a matter of surebuttal.

Thank you. It has been a real pleasure to be here.

Krock on Crosskey (Continued from page 8)

WASHINGTON, Feb. 18—In this space last Tuesday an account, necessarily inadequate, was given of a revolutionary concept of the meaning of the language of the Constitution that was evolved by Prof. William Winslow Crosskey, after fifteen years of intense research into writings contemporaneous with its drafting. It was reported that, on the evidence he offered of what words meant in the eighteenth century, these were among his startling conclusions:

¶“Commerce” meant all gainful activity by the people; hence the long-made judicial distinction between “interstate” and “intrastate” commerce has no warrant in the Constitution.

¶By “States” its drafters meant the people within specified territories, and not these territories or their internal

regulations. Hence it was intended that the power given Congress to “regulate (govern) commerce” covered all gainful activity within state borders.

¶Congress was designed to be supreme among the branches of the Federal Government; the Supreme Court was never intended to possess a general power to review the Acts of Congress, only those dealing with its specific province; and the Supreme Court was not bound to follow state courts' interpretation of state law and local common law. In the first instance it has violated the Constitution; in the second it has “abdicated” its appointed role.

Though Professor Crosskey's work is a miracle of scholarly research, and is being read with serious attention by, among others, members of the Supreme Court, its thesis is so controversial that one lawyer wrote to this department: “Now I join the book burners!” Did not, he demanded, Chief Justice John Marshall know the semantics of the eighteenth century, in which he was born and in which he helped to draft the Constitution? And, if a “state” did not mean a specific territory and local government, why did the Founding Fathers empower Congress to regulate commerce “among” the several states?

OTHER CONCLUSIONS

The author, who was law secretary to Chief Justice Taft, has answers for these and other dissents, as follows:

¶Eighteenth century documents show no evidence that “among” was used in the sense of “between.” An example is a press report that “a severe hurricane blew among the Windward Islands,” and “it is needless to point out that the hurricane blew ‘within’ as well as ‘between’ them.”

¶Marshall's career “was a long and stubborn rear-guard action in defense of the Constitution” as it was meant to be read. “Nevertheless, he was continually forced . . . into compromise and defeat, the cumulative effect of which amounted to a transformation of the Constitution.”

Book Reviews (Continued from page 5)

a Democratic plank. In Mr. Pettengill's opinion the present marginal rate of 92 per cent represents a triumph of the poor in their war against the rich foreseen by Justice Field in his opinion in the *Pollock* case. A heavy progressive or graduated income tax represents the achievement of one plank in the Communist Manifesto of 1848 and moves the country definitely along the “road to serfdom.” We should return to proportionate taxation or we all will soon join the perished civilizations of the past by consuming ourselves “through excessive and unjust taxation” until we collapse “and are succeeded by the Man on Horseback or the rank growth of the jungle.”

Articles which rise to such heights of rhetorical pitch certainly serve to demonstrate the need of an objective and logical treatment of the question of progression at a time when the needs of previous wars, the obligations of world leadership, and the demands of defense have thrust upon this country tax burdens the like of which no country has ever borne before. A reasonable degree of progression may well be a political necessity at such a time. Certainly alternatives are limited. In any event, the arguments for and against progression need new analysis at such a time. At the most, a better knowledge will help us to move intelligently forward in the job of improving the present tax system; at the least, it may comfort some of those who complain by showing that the arguments on the question go in two directions.

Professors Blum and Kalven have picked up the story of progressive taxation pretty much at the point where Professor Edwin R. A. Seligman left that story in his book *Progressive Taxation in Theory and Practice*. They call an article published in 1916 in the *Yale Law Journal* "virtually the last gasp of constitutional objection to the principle of progression" and dispose quickly of the constitutional aspects of progression. They then examine the policy objections to progression: (1) that it complicates the structure of the income tax and expands taxpayer opportunity for ingenuity directed to lawful avoidance; (2) that it is a politically irresponsible formula; and (3) that it lessens the economic productivity of society. They conclude that these arguments are not enough to stand in the way of a strong affirmative case for progression. The book then discusses the affirmative case, including the arguments (1) that progression makes for wider fluctuation of annual revenues and thus provides a built-in flexibility; (2) that benefits purchased with taxation justify a graduated scale of rates; (3) that progression establishes an equitable apportionment of the sacrifice involved in the payment of taxes; (4) that the Seligman "faculty" theory, a variation of the popular principle of ability to pay, permits graduation of rates; and (5) that progression operates to lessen inequalities in the distribution of income and even to redistribute income in a desirable way and to promote greater equality of opportunity. After this "long critical look" the case for progression turns out to be "stubborn but uneasy." To the authors notions of benefit, sacrifice, ability to pay, and economic stability have less appeal than arguments which view progressive taxation as a means of reducing economic inequalities. But the case for more economic equality is itself "perplexing," particularly when it is voiced by "those who in the quest for greater equality are unwilling to argue for radical changes in the fundamental institutions of the society."

Many persons would disagree, and many would agree, with this final and somewhat ambivalent judgment of Professors Kalven and Blum. No two persons would agree with their conclusions as to the weight to be given the respective arguments for and against progres-

sion. But few would dispute the timeliness of this survey of progressive taxation. It is a carefully documented, closely reasoned, highly readable discussion of one of the most difficult problems of our troubled times. It fills a vacuum in tax literature. It is not a "luxury" item. It needed to be written, and it needs to be widely read. Both those who favor and those who oppose progression will discuss that subject more intelligently after they have read this study.

In fact, it would be hard to think of any group in our population who would not profit from a reading of this scholarly book. Senators and representatives would acquire a useful perspective. If they will read the book carefully, students of taxation still in universities, and those in post-graduate life who have not yet resigned themselves to lack of understanding of taxation, will gain new insight into the meaning of a fierce struggle of our times. I will go so far as to urge that tax specialists will acquire increased competence in dealing with the problems they face as they represent taxpayers in practice if they are able, as they will be better able after reading the book, to integrate their problems in the panoramic development of their special subject. Too few tax specialists realize this necessity.

The book is to some extent historical and to a larger extent theoretical. That does not mean that its history is ancient, or that its theory is unrelated to modern tax life. There is nothing more relevant to tax debate at the middle of the 20th century than the questions whether progression dampens incentives and whether it aids in maintaining economic stability and a high level of business activity. Whatever one may conclude, it is important to canvass the extent to which progression complicates the positive law of taxation. And it is certainly worth while to analyze the merits of progression in the light of how our Government spends the money it collects. Last but not least, the book explores many areas and analyzes a number of principles that may be too much taken for granted in these days of high taxation.

Among those who assume the propriety of progressive taxation are many tax philosophers who like to call themselves liberals. Some of them may feel that in examining their articles of faith the book gives aid and comfort to their ideological enemies. In this respect the book could suggest to some of its readers that many liberals and conservatives are not different under the skin because they both object to the presentation of arguments against propositions in which they deeply believe. It is not the point that the book has confirmed rather than shaken my belief that there should be more, rather than less, progression in the American tax system. The effect on other readers may be different. The point is that both sides of any argument should have a fair hearing. Time has eroded many faiths to which men have given their last measure of devotion. It is as true today as it was in 1920 that the best test of truth is its ability to gain acceptance in an intellectual market place

that denies no one his opportunity to speak freely against, as well as for, the majority opinion of the moment. Some liberals would be better liberals if they were less like some conservatives, and their condemnation of their opponents would be at least more graceful and becoming if they practiced what they preached and opened their minds as freely to arguments with which they disagree as to those with which they agree.

RANDOLPH PAUL

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CONTRACTS: CASES AND MATERIALS. By Friedrich Kessler and Malcolm P. Sharp. New York: Prentice-Hall, Inc., 1953. Pp. xiv, 793. \$8.50.

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For years it has been well known that something was cooking at the University of Chicago Law School in connection with Contracts, and from time to time we have caught glimpses of the cooks at work. The product is now brought forth for public consumption and is a very welcome addition to the menu.

Kessler and Sharp show again, as Havighurst, Fuller, and Mueller had shown in different ways, that the first year course in Contracts can be made to yield fresh insight and some original views of law and society. The novelty of their treatment does not lie, however, as it does in the case of Havighurst and Mueller, in concentration on function or economic "context." Instead, the emphasis throughout is on some very broad conceptions. One of the authors recently stated his own conviction that "the all-important question of the domain of freedom of contract should from the outset be made one of the central themes, if not the central theme, in any text on contracts." It seems that the same conviction applies to casebook as well as text in the minds of both authors. Their preoccupation with this theme starts with their own introductory text which traces historically the progression: from-status-to-contract-and-reverse. Then, there is a scattering of cases that project over a very wide panorama the theme of freedom versus control. The section headings and comments through the somewhat more standard materials that follow are also calculated to keep this theme in the foreground for discussion. Then, at the end, there is a chapter of about a hundred pages that digs into illustrative problems of "irregularity, inequality, and imperfect competition"—agreements in restraint of trade, the "contract of adhesion" (illustrated by automobile merchandising arrangements), problems of labor and collective bargaining, and "status and contract in insurance."

The standard contracts materials that comprise most of the book are arranged under headings and with comments that emphasize values and objectives, often in a most arresting way. In place of the usual procession, mov-

ing from offer to acceptance to consideration to the seal, etc., the authors have mixed these elements together in unusual combinations. Consideration, for example, appears ahead of the offer-acceptance and assent problems in a context which reveals it as a limitation on freedom of contract. The subtitle of the chapter that provides this first glimpse is "the basic ideals of an individualistic law of contracts," and the doctrine of consideration is here placed beside mistake doctrines (limiting freedom to determine price), risk assumption as to unforeseen difficulties, and requirements as to foreseeability of damages (*Hadley v. Baxendale*). Then, after a brief skirmish with tests of mutual assent, the significance of the "implied contract," and preliminary negotiations as distinguished from offers, the authors return to consideration in connection with "firm offers, a preliminary study of the ideal of reciprocity"; then again with offer and acceptance in contracts by correspondence and offers of unilateral contracts; and finally work around to a direct attack on the consideration doctrine itself. But other aspects of consideration then reappear in the following chapter concerned with "fairness of the bargain and equality"—i.e., with problems of economic duress in connection with readjustments of obligations and performance of pre-existing duty. In short, the attentive reader is forced to see the protean character of the remarkable term "consideration"; forced also to relate the common law techniques for contract formation to the values they are supposed to serve.

The authors have also included substantial quantities of material that is either usually reserved for a second or third year course in Restitution or else omitted from law school instruction entirely—material on mistake, duress, and restitution to or against a promisor in default. This material is not confined to a separate section in the latter part of the book so that it can be conveniently omitted. It is dispersed throughout and is essential to much of the analysis. As everyone knows who has worked over this material, it adds greatly to the interest, complexity, and depth of contracts problems. There is very much to be said for including it in the first year Contracts course, full-scale. The only arguments against full-scale inclusion that impress the present reviewer (and they do) rest on the difficulty of the issues they raise and the unsatisfactoriness of partial treatment in a Contracts course that is already overcrowded. Altogether, Kessler and Sharp have achieved a major shift of emphasis and provided, at the least, a much needed corrective. The standard materials for Contracts courses have surely given a distorted picture of the functions and limitations of contract in our society. Great teachers have no doubt transcended the materials. One need only mention Corbin, Oliphant, and Llewellyn to suggest the brains and imagination that have worked over this same subject matter. But on the whole, country-wide, the attraction of the usual Contracts course has been the opportunity for intensive drill in technique and analytical

skills while pursuing some simple, scarcely debatable objectives. It is difficult to oppose, if one wished to, the objectives of effectuating intent and maximizing individual autonomy. The limitations on these objectives are usually thought to be confined to the doctrines of illegality, which in the casebooks are left to the last section so that they are never reached at all or are reserved for the last day's "lecture." The result is training in close and refined analysis with very little attention to those larger issues of policy that require a different but equally necessary lawyer's technique—the weighing of conflicting interests, the choice between basic values, maturity of judgment.

The question that obviously cannot be answered without using this book is whether the authors have gone too far in reversing directions. By comparison with the widely used Contracts casebooks, excepting only Fuller's, this casebook is short. It has 793 pages of which 100 pages at the end are devoted to the "control" sector—agreements in restraint of trade, labor and collective bargaining, etc. It also includes, of course, the material on restitution for mistake, duress, and related grounds, though the volume of this is not great—perhaps 25 cases. One should also add that somewhat smaller type and a fuller page give about 20 per cent more reading matter per page than most of the standard books. Still, it is not a long casebook, and the inclusions mean many exclusions. For example, the treatment of equitable remedies seems exceedingly skimpy—five cases in a section of eleven pages plus the scattering of six or seven specific performance cases that almost all the Contracts casebooks use and that are inserted for reasons other than the light they throw on equitable remedies. It is disappointing too that two authors, both of whom are so competent in dealing with foreign law, should not have slipped in at least a few ideas by way of comparison with European results. But it is useless to ask for too much. These particular shortfalls, if shortfalls they are, do not raise so great a question as the thinness of treatment of many standard problems of analysis, especially the more technical problems. Many times in reading over the cases and notes, one feels that the authors are content to be suggestive and wish at all costs to avoid being exhaustive. This becomes a question of teaching theory, and it may be that Chicago students are brighter, but one often wishes that implications were explored, suggestions made more explicit, and more material provided for working out the hard questions. Even if one concedes that offer-acceptance, consideration, and conditions have, in the past, been fantastically overdone, the question survives in my own

mind whether Kessler and Sharp, under compulsions of space, have not left them quite a bit underdone. One could only tell by trying.

The care and scholarship shown throughout are of the highest order—all that one would expect of the authors. The notes and authors' text are full of clues and suggestions helpful to the teacher (question: how many of the footnote citations do the authors really expect students to read?). The arrangement is ingenious and thought-provoking all the way. The selection of cases is excellent. This is, in short, a first-class book which will open new directions for all teachers of the subject and have permanent effects for the good of all concerned.

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Sheldon Tefft (Continued from page 2)

at Oklahoma in 1948. I understand that he has resisted other recent invitations. He has recently edited a new casebook on property with Mr. Aigler of Michigan.

This amateur profilist has not had easy work with Sheldon Tefft. His eccentricities, if any, are minor, and in supposedly more serious and important matters the record is singularly blank, for Tefft doesn't "do" things, doesn't agitate, doesn't champion, doesn't sign petitions, and doesn't join. He talks, or rather he debates, so that you can't get much out of him—very few concessions or admissions. My most authentic informant said, years ago, "Well, you know, Sheldon is cagey."

There are only a few light touches to close on. I have learned in my researches that my subject is at heart a mechanic (he repairs bicycles), that he has a strong feeling for antique objects and jewels, and that he is extravagant. These are "profile" data of fair quality. I believe some of them. But I shall have to deflate the sensationalism of that last item. No one can ever persuade me that Sheldon Tefft is extravagant. It is a fact, verifiable by his every acquaintance, that he is always searching for bargains. I have never heard, from him, of his finding any. The Tefft ideal price level is *so low* (an undetermined figure always less than any price actually paid) that I am sure he feels reckless whenever he makes a purchase. That must be the reason for the attribution of extravagance; I can think of no other.

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